Central Law Journal.

ST. LOUIS, MO., DECEMBER 10, 1920.

MAY A RECEIVER PURCHASE TRUST PROPERTY WHEN SOLD BY A REFEREE IN PARTITION?

The Supreme Court of Iowa sets a dangerous precedent in the recent case of Melin v. Melin, 178 N. W. 346, when it declares that a receiver of real property may purchase the property in his possession at a sale by a referee in partition.

The facts in this case disclose clearly the sound reason that justifies the rule that a trustee can purchase trust property, neither at his own sale, nor, as we believe, at another's sale of the trust property. In this case the parties plaintiff and defendant are children of one Melin, who died leaving a farm of 200 acres to be divided among five sons and one daughter. Before the sale in partition was ordered one Challgren was put in possession of said farm as receiver to collect the rents and profits thereof for the benefit of the heirs. At the partition sale by a referee, Challgren, who was still in charge of the property, made the highest bid. It also appears that Challgren had entered into an agreement with four prospective purchasers to buy the property jointly in the name of Challgren. The trial court found no collusion in this agreement and the Supreme Court refused to follow the almost universal rule that a trustee cannot purchase the trust property, declaring that this rule was unnecessarily strict and that where the trustee takes no advantage of his position the sale is valid. The Court admitted that a receiver in such case was a trustee and that the old English rule followed in this country prevented a trustee from buying trust property, irrespective of his good faith. In refusing to follow this rule, the Court said:

"Here the receiver was not in the actual occupancy of the land, but leased the same to tenants, collected the rents, paid taxes and interests, and generally looked after the farm. Such relation to the parties cannot well be said to have afforded special means of knowledge nor to have conferred power to affect injuriously the interests of the tenants in common. Other bidders at the sale had the same opportunities as had he to examine the land. He owed the tenants in common no duty with respect to the sale by the referee, even though standing in the relation of trustee toward them as *cestuis que* trustent, in the matter concerning the income from the land. Surely his position as trustee conferred no power with reference to the sale, and as to farm land no special opportunities of knowledge not enjoyed by others on examination was enjoyed. It is not necessary to go to the extent of many decisions in upholding the right of trustee to bid at judicial sales not brought about by themselves. No general rule with reference to these can be laid down, save that to permit of being purchasers their relation must not be such as to bring in conflict their individual interest with that of the trustee. We think this the true test, for, even though the trustee be in charge or possession of the property, if his duties with respect thereto are not such as that becoming a purchaser would put his individual interests in antagonism with his duties as trustee, there could be no temptation to go wrong, and they ought not to preclude him from bidding at such a sale."

There can be no doubt about the rule that a trustee cannot purchase at his own sale. This rule is established by a multitude of cases in England and America, and this without regard to the fairness of the transaction or the adequacy of the price. See 39 Cyc, p. 366, and host of cases there cited. But is the rule changed if the property is not sold by the trustee himself but is purchased by him at a judicial sale conducted by some officer of the court or at a sale under a mortgage conducted by the trustee therein named? This exact situation came before the Master of Rolls in England in the leading case of Nugent v. Nugent, 77 L. J. Ch. (N. S.) 271, 1 British Ruling Cases 405. In this case it appeared that the defendant in a partition action, and part owner, was appointed receiver of the rents and profits

of a house. Later a mortgagee obtained an order giving her liberty as such to take possession and exercise the power of sale by public auction. Though not taking possession, she put the house up for sale at auction, and in January, 1906, the defendant, without leave of court, instructed an agent to bid at the auction and purchase the property. On hearing, the trial court held that the receiver could not purchase the property without the sanction of the court, even though the sale was made by the mortgagee with leave. On appeal, the ruling was affirmed. The Master of the Rolls said:

"The Court, in dealing with this class of cases, does not proceed upon the footing that there has been fraud or improper concealment, or any special advantage taken by the receiver, but it proceeds upon the general rule that in cases of this kind the purchase ought not to be allowed at all, because it is a dangerous thing to allow, as in most cases it is impossible to ascertain whether the receiver has or has not taken undue advantage of his position."

Some courts have held that a trustee could purchase if the transaction is entirely free from bad faith, but these cases are few and are usually cases where the sale is for the benefit of the *cestui que trust*, and even in one of the states which hold to this rule (Pennsylvania) it has been held that the trustee who purchases such property may be held to have purchased the property for the *cestui que trust* whenever it is the latter's advantage to do so.

Some courts permit a trustee to purchase the trust property with the Court's consent. Tennant v. Trenchard, L. R. 4 Ch. 537; Hayes v. Hall, 188 Mass. 510, 74 N. E. 935; Corbin v. Baker, 167 N. Y. 128, 60 N. E. 332; Carson v. Marshall, 37 N. J. Eq. 213. But it appears, strangely enough, that the Iowa Supreme Court, which rendered the decision in the principal case, declined to indorse such a practice. Linsley v. Strang (Iowa 1910), 126 N. W. 941. We see no objection to this exception to the general rule, for there may be cases where it would be for the benefit of the *cestui que trust* for the trustee to bid at the sale of the trust property. But this benefit ought clearly to appear and the interest of the trustee disclosed in advance of the sale so that the beneficiaries of the trust shall have ample opportunity to protect their own interest. If in such a case the beneficiaries should offer any sincere objections, it is quite likely the Court would refuse to permit the trustee to bid at the sale.

The Iowa decision in the Melin case, in our opinion, is also a dangerous departure from a very sound rule of evidence. For, the burden of proof in cases where a fiduciary is a party is, by this decision, thrown on the *cestui que trust*. In every case where a fiduciary is charged by the beneficiaries of the trust with fraud or unfair dealing, the general rule that the one who charges fraud or unfair dealing must prove it, is reversed and the burden placed on the trustee to show that the transaction is fair and reasonable. (Jones on Evidence, Sec. 190.) In spite of the apparently collusive agreement of the receiver in the principal case to share with prospective bidders the benefits of his purchase, the Iowa Supreme Court gravely announces that the *cestui que trust* did not produce "evidence sufficient to warrant the inference that there had been any improper competition." The decision cannot be justified on any just principle of law or on any sound rule of public policy.

NOTES OF IMPORTANT DECISIONS.

LEGALITY OF CONTRACT TO PAY WIFE MONTHLY STIPEND TO RETURN TO HUSBAND WHO GAVE WIFE GROUND FOR DIVORCE.—Are married women to become so independent that it will be necessary for the husband to hire his wife to live with him? While a recent decision of the New York Court of Appeals does not go so far as to justify such contracts it comes very near to doing so. Rodgers v. Rodgers, 128 N. E. 117. In this case the wife, it appeared, had brought suit for di-

vorce against the husband in 1909 on ground of his adultery. In order to get her to dismiss the suit the husband and his father entered into a written agreement with her to pay her $300 per month during the remainder of her married life. From that date until the death of the husband in 1917 she was paid $1900 and there was due and owing on the contract at that time $29,600, for which amount she is suing her father-in-law, who was a party to the contract. The trial court sustained a demurrer to the petition which judgment the Court of Appeals reversed on the ground that the complaint stated a cause of action. The Court said:

"We think that the complaint is sufficient. The agreement set forth therein is not on its face against public policy. It is for the resumption of marital relations between husband and wife separated for cause. In the absence of proof, it may not be presumed that the wife's grievance was unsubstantial. It rests on a valuable consideration. The wife condoned the alleged adultery of the husband. That was a detriment to her. She surrendered a right. The husband got rid both of the action and the cause of action for divorce. He might have been successful in his defense, but it was a substantial benefit to him to have the case ended and his wife again under his roof. The performance of marital duty should not be made the subject of bargain and sale, but it does not appear that reconcilement was plaintiff's duty in this case. Rather it was her right to refuse to condone an offense against the marriage relation and to insist on a divorce, with separate support and maintenance. The husband was not hiring a discontented wife, separated from him without good cause, to return to him. She was to be paid to give up her right to live apart from him. She did not return until she was assured of proper treatment as a wife, and the court will not say to her that she sold her forgiveness, and that 'conjugal consortium is without the range of pecuniary consideration.' To apply such a rule to cases like this would be to discourage the reunion, which the law should favor, of couples unhappily parted. We are dealing with the contract that was executed by plaintiff, and not with unexecuted possibilities based on subsequent separation of husband and wife."

The contract in this case is not a contract to induce a wife to perform her duties as wife—such a contract would be void for want of consideration, for in such a case the wife would be agreeing to do no more than she ought to do. It is more in the nature of a post-nuptial settlement with this difference that unlike most post-nuptial settlements, there is a consideration to support it. Ordinarily an agreement after marriage to pay the wife a certain sum of money is good only when executed. Such an agreement has not the marriage to support it as in the case of an ante-nuptial settlement, and if there is no other consideration the agreement so far as it is executory, fails. But in the principal case, although this settlement is post-nuptial, there is a valuable consideration—the giving up by the wife of a right of action against the husband for divorce and alimony. If the plaintiff's father-in-law saw fit to promise plaintiff $300 a month for the rest of her married life if she would drop her suit for divorce and continue to live with his son as his wife, he ought to be compelled to keep his agreement.

There is a Texas case which holds that a post-nuptial promise of the husband to pay money to his wife in consideration that the wife would continue to live with him rests on an invalid consideration. Roberts v. Frisby, 38 Tex., 219. Courts should be careful to make a distinction between agreements which attempt to determine the obligations attached to the marriage status, of which consortium is of course one, and agreements which affect the property or personal rights of the spouses. Agreements of the former character are void since the law does not permit the parties either by ante-nuptial or post-nuptial contracts to change or affect their marital obligations. But agreements either before or after marriage, resting on a valuable consideration, may affect or change the financial obligations and property rights of the spouses. While a husband and wife could not by their contract affect their duty to live together, yet where either spouse is relieved of this duty by law and is given a right of action against the other as for divorce and alimony, this purely personal right may be given up as a valid consideration for an agreement by the husband or his father to make a settlement upon the wife.

RIGHT OF TELEGRAPH COMPANY TO CHANGE AN INTRA-STATE TO AN INTER-STATE MESSAGE BY THE ROUTE OF TRANSMISSION.—The Supreme Court has made it possible for telegraph companies to evade the law of certain states making them liable for mental suffering alone apart from other damage suffered at the same time by permitting the company to route an intrastate message through an adjoining state and thus making it an interstate message. Western Union Telegraph Co. v. Speight, 41 Sup. Ct. 11.

In this case the plaintiff, Speight, sought to recover for mental suffering caused by a mistake in delivering a telegraphic message. The message handed to the defendant was "Father died this morning. Funeral tomorrow, 10:10 a. m." and was dated January 24. As delivered to the plaintiff on January 24 it was dated

January 23 and thus caused her to fail to attend the funeral which otherwise she would have done. The message was from Greenville, North Carolina, to Rosemary in the same State and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary.

It is the rule in the federal courts to follow the common law rule that no recovery can be had for mental suffering alone. Southern Express Co. v. Byers, 240 U. S. 612, 36 Sup. Ct. 410, L. R. A., 1917 A, 197. The trial court set aside a verdict for plaintiff in which the jury found that the message was sent out of the state for the purpose of evading state liability. The Supreme Court of North Carolina reinstated the verdict which is the judgment which the Supreme Court reverses. Chief Justice Holmes concisely and bluntly states the rule as follows:

"We are of opinion that the judge presiding at the trial was right and that the Supreme Court was wrong. Even if there had been any duty on the part of the Telegraph Company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two states is interstate commerce as a matter of fact. Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214; 47 L. Ed. 333. The fact must be tested by the actual transaction. Kirmeyer v. Kansas, 236 U. S. 568, 572, 35 Sup. Ct. 419, 59 L. Ed. 721."

The company justified its action by some evidence that its wires were strung in such a way as to make the route chosen the easiest and quickest. But Justice Holmes pays little attention to the question of motive, saying:

"The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when as here the termini were in the same State the business was intrastate unless it was necessary to cross the territory of another State in order to reach the final point. This, as we have said, is not the law. It did however lay down that the burden was on the Company to show that what was done 'was not done to evade the jurisdiction of the State.' If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss."

"REASONABLE" — USE OF THE TERM IN RECENT BRITISH CASES.

This word is extremely common in our contracts and statutes. Possibly there is no other word which occupies so prominent a position. Such phrases as "reasonable notice," "fair and reasonable," "reasonable and proper" and others similar, occur frequently and in every case in court, reference probably is made to the "reasonableness" of the arguments submitted. It has been well remarked that an appeal to reason is an appeal sometimes to an objective standard and sometimes to judicial discretion. As an instance of the former, there is the case of Smith v. Boon,[1] a prosecution under the Light Locomotives and Highways Order 1896, in which it was held that the "reasonable and proper" speed of a motor on a highway has to be judged apart from the actual inconvenience caused. The argument of the accused in that case was that his speed could not, in the circumstances do any harm and therefore that it was not "unreasonable or improper." The magistrates found as a fact that his speed of eighteen miles an hour was not "reasonble," and on appeal the conviction was upheld. On the other hand, in cases of contracts which stipulate for performance within a "reasonable" time, it is well-known that the phrase is interpreted according to the circumstances of the case and with particular reference to the means and ability of the person by whom the contract is to be performed or the duty discharged. Three very recent cases discuss the term. Attwood v. Lamont,[2] related to a restrictive covenant between an employer and an employe, as to the latter not trading within a certain area after leaving the employment. In a lengthy judgment, Lord Justice Younger discussed the "reasonableness" of such agreements. An important element in

(1) 84 L. J. 593, 65 J. P. 486.
(2) 1920 36 T. L. R. 895.

such agreements pointing to "unreasonableness" is their restraint of trade, a fact which indeed operates in determining the "reasonableness" of all agreements and, as we shall see later, by-laws or subsidiary legislation of that kind. In another case[3] the railway company's ticket conditions were attacked as not being "reasonable" but the court pointed out that these formed part of a contract and like every contract conditions the element of "unreasonableness" did not enter into them unless they were so grossly extravagant as to the amount of fraud or were wholly irrelevant. "Reasonable" conditions in that case were defined as being "such as no honest man would try to insert or no reasonable man would dream of looking at it." The third case was in the Scottish Court of Session,[4] in which it was held that where lenders on mortgage agreed that the loan should not be called up for fourteen years so long as interest at 4 per cent was punctually paid at quarterly terms, payment six days after a term was not punctual payment in the sense of a contract and the lenders were entitled to call up their money. The Lord Ordinary by whom the case was tried was of opinion that in the sense of the agreement which had to be read reasonably, payment had been made in accordance therewith, and on appeal this was the view taken by one of the judges in the Inner House, but the majority of the appellant judges found that payment had not been punctually made and that the pursuer was entitled to the finding asked for.

Dealing first with the minority opinions, they emphasized the fact that to refer the word "punctual" to the exact day would be a judicial and not a "reasonable" construction of the contract; and that at previous terms there had been delay even on one occasion the difference of twelve days, but there was nothing to show that plaintiff considered this unpunctual payment. Weight was also given to the circumstance, that the proprietor of the estate was on active military service.

The effect of the judgment of the majority of the Court is really to hold all these arguments as irrelevant. They find that punctual payment means payment made punctually on the day fixed for payment and that the word is not open to any interpretation. As the Lord President put it "payment made six days later than the day fixed for payment is not punctual payment. If a payment six days later is to be considered punctually made, where is the line to be drawn between punctuality and unpunctuality." With regard to construing the word "reasonably" his Lordship thought that reasonable construction in "law meant to take the words used by the parties in their plain and natural sense and not in the sense which a judge may think fit to put upon the term."

This is a just doctrine led by Lord Chancellor Westbury[5] that in interpreting a statute the clearness and certitude of the law are for a judge sufficient reason "rules which govern the transmission of property are the creators of positive law and when once established and recognized their justice or injustice in the abstract is of less importance to the community than the fact that the rules themselves shall be constant and invariable" and Lord Halsbury[6] similarly remarked, "a court of law has nothing to do with the reasonableness or unreasonableness of a statutory provision excepting so far as it may help in interpreting what the legislature has already said."

A field of law, however, in which the element of "reasonableness" plays an important part is the validity of by-laws made by local authorities, railway companies or other statutory incorporations. Courts of law have the power to determine whether a by-law is a reasonable one, upon the principle that delegated legislation is only permitted

(3) Gibaud v. Great Eastern Railway Co., 1920, 86 T. L. R. 84.
(4) Gatty v. McLaine, 1920, 57 S. L. R. 334.
(5) Ralston v. Hamilton, 1862, H. L. C. 137.
(6) Cook v. Vogler, 1920, A. C. 107.

upon the assumption that it shall be reasonable. The following cases illustrate how this power has been exercised. By-laws by a corporation excluding persons from an office to which by charter they are eligible are bad as being unreasonable; but those which lay down a criterion of fitness for office are good.[7] By-laws made to cramp or restrain trade are bad; but by-laws made to restrain trade in order to the better government and regulation of it are good in some cases, namely, if they are for the benefit of a place, and to avoid public inconveniences, nuisances, etc., or for the advantage of the trade and improvement of the commodity.[8] A power to pass by-laws for "regulating and governing" certain traders in a city does not include power to prohibit them altogether from plying their trade in the city.[9] A by-law is unreasonable if it is oppressive or curtails the liberties of individuals more than is necessary to give effect to the object which it has in view;[10] but a by-law which may impose hardship or inconvenience upon an individual is not unreasonable. if it is for the general good.[11] What is reasonable in one locality may not be so as to another, because of the different circumstances of the two districts;[12] and also a by-law may be unreasonable by nature of the penalty attached.[13]

These are some of the leading tests as to the "reasonableness" of by-laws and in them may be found criteria which may be usefully referred to when the question of "reasonableness" arises in other branches of law.

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(7) Q. v. Saddlers' Company, 1862, L. J. Q. B. 337.
(8) Mitchell, 1 Peer. Will. 184, per Parker, C. J.
(9) Municipal Corporation of Toronto, 1896, App. Ca. 88.
(10) Munro, 1887, 57 L. T. 366.
(11) Hendon Local Board, 1889, 42 L. R. Ch. Div. 402, followed in District Council of Barton Regis, 1896, 12 T. L. R. 367 (by-law as to width of streets).
(12) Heap, 1884, 12 Q. B. D. 617.
(13) Saunders, 1880, 5 Q. B. D. 456.

DISCOVERY UNDER NEW RULES OF PRACTICE FOR FEDERAL COURTS OF EQUITY.

Old Rules—Under the old rules in equity procedure as adopted and in force down to 1850 a defendant was not bound to answer any statement in the bill, unless specially and particularly interrogated thereto, nor any interrogatory about which he was not interrogated in the bill. In 1850 this, known as the 40th rule, was abrogated by the Supreme Court. There was, therefore, no longer any need, in order to obtain discovery, for a defendant to be specially interrogated upon any statement in the bill, but complainant could answer if he desired.[1] The old rules were further amended in 1850 by adding a new rule (Rule XLI) so that the interrogating part of the bill should contain interrogatories consecutively numbered in a note at the foot of the bill, and only these should the defendant be required to answer.[2]

At the December term, 1871, an amendment was made which is embodied in Rules XLII, XLIII, XLIV.[3] These rules provide that the interrogatories constitute a part of the bill and any alteration or addition to them, an amendment thereto; that the old form of conclusion should be altered so that defendant should make answer to each interrogatory, declining, however, to answer any one of them as to which he might protect himself against by demurrer, the same as against other parts of the bill.

Discovery Under Old Rules—In a case by Eighth Circuit Court of Appeals, decided in 1898, while the old rules were still in effect, it is said in an opinion by Sanborn, C.J., concurred in by Thayer, C.J., and Philips, D.J., that: "Are appellants entitled to a discovery, in aid of their title and suit, of the facts within the knowledge of the appellees? It is true that the right

(1) Dewhurst's Rules of Practice in U. S. Courts, 2nd Ed., 392.
(2) Ibid. 393.
(3) Ibid. pages 393, 394.

of discovery in Courts of Equity arose from the necessity of searching the conscience of the opposing party in order to ascertain facts, and obtain documents within his knowledge and control, which the complainants could not reach at law because of their inability to compel the examination of the defendant under oath. It is true that the federal and state statutes now in force, which enable the complainant to obtain such examination, have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of Courts of Equity to enforce them. They have only added another right to that which had already been secured in Courts of Chancery. Every bill for relief exhibited in a Court of Equity is, in effect, *a bill of discovery*,[4] because it asks or may ask from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a Court of chancery, and the right of a party to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right or title or to apply an equitable remedy."[5]

In the Third Circuit Court of Appeals, decided five years prior to the promulgation of the new equity rules in 1912, there is a distinct ruling that bills of discovery were not abolished by federal statutes giving the right to production by parties of books and writings and making of parties competent witnesses, though in many cases the necessity therefor is removed.[6] The court in this case refers to very early English cases in which the right to file a bill of discovery was sustained and to text in standard authors and in state cases showing the purposes for which discovery, by means of a bill was had.

(4) Italics are mine.

(5) Kelly v. Boetcher, 85 Fed. 55, 64, 29 C. C. A. 14.

(6) Brown v. McDonald, 133 Fed. 898, 67 C. C. A. 59, 68 L. R. A. 462.

A very excellent case is one from Eighth Circuit Court of Appeals, where opinion is by Philips, D.J., sitting with Sanborn and Thayer, C.J., in Kelly v. Boetcher *supra*, and sitting in this later case with Sanborn, C.J., and Riner, D.J.[7] This case says: "That bills of discovery and relief inhered in the ancient jurisdiction of Courts of Chancery in England at the time of the adoption of the federal judiciary act is beyond question. This being so, the like jurisdiction inheres in the federal courts, unless abolished by statutes, or changed or modified by some rule adopted by the Supreme Court. No such statute has been passed, and, so far from the Supreme Court having interdicted the practice, the rules in equity, 40, 41 and 44, expressly recognize the existence of bills for discovery." There is not in these rules any express recognition of bills of discovery, but they must be considered to lean in this direction.

But in an earlier federal case it is said: "Power is conferred upon the Supreme Court to prescribe rules regulating the practice of the Circuit Courts in Equity, and it is more properly the province of that court than of the Circuit Court to determine what, if any, innovations shall be made in the existing practice in consequence of the more enlarged powers now enjoyed by courts of law. Until some action by that court, this court should be slow to declare that a jurisdiction so ancient and so convenient as that of discovery, should be surrendered, or should depend upon the accidents of legislation respecting the practice of common law courts."[8]

In a Supreme Court case, decided just two years prior to the new rules coming into force, it was said, in discussing Section 724, R. S. U. S., referring to trial of actions at law, where it was contended that "in the trial" implies a restricted use of such an equitable remedy as discovery that: "Un-

(7) McMullen Lumber Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433.

(8) Colgate v. Compagnie Francaise, etc., 23 Fed. 82.

der the ordinary rules of procedure in chancery to obtain a discovery of evidence material to the maintenance or defense of an action at law, such evidence must, in the very nature of things, result in production *before*[9] the trial at law. Such procedure is still open if it is desired to have the evidence produced before the trial. A court of equity does not lose its jurisdiction to entertain a bill for discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances. See the very instructive discussion by Judge Wallace in Colgate v. Compagnie Francaise etc., 23 Fed. 82."[10]

In a case in the same volume it was said by Mr. Justice Hughes that "Section 724 * * * was to meet the difficulty arising out of the rules relating to parties at common law and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action. Carpenter v. Winn, decided this day, ante p. 533."[11] In the Carpenter case there was reversal, because the statute merely contemplated production at and not before trial and, therefore, the motion under the statute did not, however, strong might be the inference to the contrary, displace procedure, by bill of discovery, to obtain information in advance of a trial.

Necessity for Discovery — It has been said that: "As the object of this jurisdiction in cases of bills of discovery is to assist and promote the administration of public justice in other courts, they are greatly favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction.[12] The author there speaks of circumstances constituting objections to the use of bills of discovery, among others discovery from a mere witness. But in a case decided in Third Circuit Court of Appeals, it was ruled that, if a witness stands in some special way to the subject-matter of the suit, as that he had purchased on the authority of clients interested in a proposed suit, he might be subject to a bill of discovery.[13] And so in other ways a general principle may be restricted in its application, when right and justice may demand. A court of equity is always ready, in following the law, to enlarge its jurisdiction so as to correct the law "wherein by reason of its universality it is deficient." The law speaks to the world like a tyrant; in a court of equity it is prevented from working unintended injustice.

The New Rules—These rules were promulgated by the Supreme Court of the United States on November 4, 1912, not for procedure in that tribunal, but in aid of procedure in "courts of equity of the United States." To it has been accorded, as a superintending tribunal over courts of original jurisdiction, the power to prescribe rules of practice in those courts. As was said by this superintending tribunal:

"This court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the Constitution and laws of the United States. Poultney v. La Fayette; the St. Lawrence, Black, 522, 526; the Lottawanna, 21 Wall. 558, 576, 579." And speaking of a rule regulating the practice upon appeals and writs of error, the court added: "Nor has it assumed to do so."[14]

Here I assume the same thing in its formulation and promulgation of these new rules. But there has been much discussion and variety of opinion in the District Courts and Circuit Courts of Appeal, whether the new rules, as superseding the old rules, enlarge or extend, lessen, abolish or substitute another proceeding for a bill of dis-

(9) Italics are mine.
(10) Carpenter v. Winn, 221 U. S. 533, 539, 55 L. Ed. 842.
(11) Am. Litho. Co. v. Wreckmeister, 221 U. S. 603, 55 L. Ed. 873.
(12) Story's Eq. Jurisprudence, § 1488.
(13) Kurtz v. Brown, 152 Fed. 372, 81 C. C. A. 498, 11 Am. Cas. 576.
(14) Hudson v. Parker, 156 U. S. L. C. 284, 39 L. Ed. 426.

covery said to exist under "the inherent powers of a court of chancery."[15]

In the District Court for the Southern District of California, in an opinion rendered on July 10, 1919, equity rule 58 was considered. It was said: "Since the equity rules were reformed for expediting and simplifying the practice and the attainment of the ends of justice, they should have a liberal interpretation and enforcement to that end. Some of the courts seem inclined to throw difficulties in the way of discovering the truth as provided by rule 58, and oppose the evident purpose of it. The old rules are abolished. There is no reason why the procedure now should be hampered by restrictions imposed by any previous rules or procedure. The truth should always be sought after, and the courts should eagerly enforce any method of securing the truth. It makes no difference whether the facts are as much within the knowledge of the plaintiff as of the defendant. The facts have to be proven, and if the plaintiff can get an admission from the defendant, it saves the necessity of proving the facts, except by such admission of the defendant. The rule expressly provides that the plaintiff may propose interrogatories to elicit facts material to the support or defense of the case. To say that the plaintiff shall not inquire about the facts that may relate to the defense is to construe the rule in plain derogation of its language and purpose."[16]

In this case there were interrogatories seeking to discover matter alleged to be "as much in the knowledge of the plaintiff as of the defendant," and the rule says either plaintiff or defendant "may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause." It seems to me that the natural interpretation to be given to these words is that the plaintiff's interrogatories must refer to what is "material to the support" of his cause and defendant's interrogatories to what is material to his defense. If this were otherwise, then the principle, held potent under the old rules, that a "fishing bill" should be dismissed[17] might be somewhat emasculated, and that announced in Kelly v. Boetcher *supra* that discovery by plaintiff is limited to such facts as will aid in the maintenance of his cause is done away with.

There appears some support for the ruling in Quirk v. Quirk *supra* in a decision by Sixth Circuit Court of Appeals, where a demand was made on defendant to admit in writing the execution and genuineness of documents to be used in evidence, under the provisions of rule 58.[18] This rule provided that demand might be made for such admission and if not made within five days, the cost of proving such document should be paid by the party refusing, "unless the trial court shall find that the refusal was reasonable." Defendant contended that plaintiff was in control of the documents asked for and they were provable in the ordinary course of procedure, and the court sustained the contention, because this being a question only of taxing costs this "in equity cases is within the sound discretion of the court," which was not thought to have been abused by the court below. This does not amount to a great deal, except as saying the equity rules were not like a law of the Medes and Persians to be literally applied in all cases.

But there is a case where it was held, but no cases are cited in support of the ruling, that : "Equity grants discovery in aid of a plaintiff's right or cause of action or in aid of a defendant's defense. These are defined by the issues of the case; whereas the amount of damages is never at issue. If a plaintiff prevail upon the issues upon his cause of action, he will be entitled to nominal damages, though he prove no damage

(15) Kelly v. Boetcher, supra.
(16) Quirk v. Quirk, 259 Fed. 597.
(17) Carpenter v. Winn, supra.
(18) Wagner v. Meccano, Ltd., 246 Fed. 603, 158 C. C. A. 573.

at all, and, of course, if a defendant prevail upon the issues as to his defenses, no damages will be recoverable. The amount of damages is not an issue, but follows the determination of the issues in the case, and discovery is granted only in aid of the issues."[19] To this ruling made by Second Circuit Court of Appeals certiorari was sought and denied,[20] was where a bill of discovery was in aid of an action at law, and the conclusion above stated followed lengthy citation from Judge Lurton's opinion in Carpenter v. Winn *supra*. There is no specific reference to rule 58, and the ruling is based on the principle that as a bill in equity is not maintainable "for a naked account of profits and damages against the infringer of a patent,"[21] so it must be that a bill of discovery cannot be in aid of an action at law. I think this reasoning is logical, and this case goes to show that rule 58 does not depart in any way from rulings of which Kelly v. Boetcher *supra* is a fair representative. However, it seems to me that the intensely technical reasoning that the court applies in the Munger case was not necessary to be used, but, if there is jurisdiction in equity it can go to the end of giving full and complete relief by means of discovery as in the case of any other process in chancery. In the case of Kelly v. Boetcher damages were sought and the court strongly implies that inquiry into amount came as much within the purview of a bill of discovery as any other fact sought by a plaintiff.

Conclusion—It seems to me, therefore, that the new rules are the same as the old, extending the old, so that a defendant may use the provisions of rule 58 as freely as may a plaintiff. These rules aim at expedition with far more certainty than the old, but the essential principle behind them is that discovery has long been recognized as inherent in equity jurisdiction, but as said in Hudson v. Parker,[22] the Supreme Court has not assumed to restrict the inherent jurisdiction it possesses nor that possessed by other courts for which it has been empowered to make rules in the administration of equitable relief.

N. C. COLLIER.

St. Louis, Mo.

(19) Munger v. Firestone, T. & R. Co., 261 Fed. 921, C. C. A.

(20) S. C. v. S. C., 40 Sup. Ct. 392.

(21) Root v. Ry. Co., 105 U. S. 189, 26 L. Ed. 975.

(22) 156 U. S. L. C. 284, 39 L. Ed. 426.

LANDLORD AND TENANT—EVICTION.

GENERAL INDUSTRIAL & MFG. CO. v. AMERICAN GARMENT CO.

Appellate Court of Indiana, Division No. 2. Oct. 14, 1920.

128 N. E. 454.

The landlord, if failing to perform the agreement in its lease to heat the premises, so that the tenant is prevented from having the comfortable use and enjoyment of the premises, cannot complain because of abandonment by the tenant and the tenant's refusal to further pay rent; as failure to furnish heat may constitute a constructive eviction.

McMAHAN, C. J. Complaint by appellant against appellee for rent. Appellee answered by an answer in four paragraphs, first, general denial, second eviction. The third and fourth paragraphs specifically allege that under the terms of the lease between appellant and appellee appellant was required to properly heat the demised premises which were on the fourth floor of a building owned by appellant; that other tenants also occupied space of the fourth floor, appellant retaining the control and management over the whole of the building, including halls and stairways; that appellant permitted the halls and stairways to be and become dirty and in a filthy condition, so that the premises were for that reason untenantable; that appellant allowed the roof over the premises occupied by appellee to become out of repair so that snow and water leaked through from the outside, rendering said premises untenantable; that by reason of the acts of appellant in permitting said premises to become dirty and unclean, and in permitting the roof to become out of repair, and in failing to furnish the

necessary and proper heat, appellee was compelled to and did vacate the premises. From a judgment in favor of appellee appellant prosecutes this appeal, and by the assignment of error challenges the action of the court in overruling its demurrer to the second, third, and fourth paragraphs of answer, and in overruling its motion for a new trial.

In the absence of a motion to make more specific the allegation in the second paragraph of answer that "defendant was evicted by the plaintiff from all of the premises" is sufficient to withstand a demurrer where the only contention is that the allegation that defendant was evicted is a conclusion of law, and not a statement of fact.

The main objection urged to the third and fourth paragraphs of answer is that at the time appellee vacated the premises the cause which it claims necessitated the vacation of the premises had ceased to exist. The answers allege that during the months of January, February, March, and April, 1914, the appellant failed and neglected to furnish the necessary heat in order to make the premises habitable, that on one or more occasions during said months appellee complained to appellant about its failure to furnish the necessary heat, and that about the 1st of March, 1914, notified appellant that because of appellant's failure to furnish the necessary heat appellee would vacate said premises as soon as appellee could find a suitable place wherein it could carry on its business, that appellee was unable to find any location suitable for its business, and which could be prepared for the installation of its machinery before the last of May, 1914, and that it did as soon as possible, and prior to the 31st day of May, 1914, vacate the premises mentioned in the complaint.

Appellee occupied a part of the building under lease for a term of years. The rooms are designed to be heated by steam, and the lease provided that such heat should be furnished by appellant. Appellee in the third and fourth paragraphs of answer relies upon the special defense that it was compelled to vacate the premises owing to the failure upon the part of appellant to furnish sufficient heat to make the leased premises habitable. The agreement to furnish heat was part of the contract of lease, and if appellant failed to perform its agreement in such respect, so that appellee was prevented from having the comfortable use and enjoyment of the premises, it is in no position to complain because of the abandonment by appellee and its refusal to make further payment of rent. Piper v. Fletcher, 115 Iowa, 263, 88 N. W. 380.

As said by the Supreme Court in Talbott v. English, 156 Ind. 307, 59 N. E. 860:

"Eviction is either actual or constructive, actual when the tenant is deprived of the occupancy of some part of the demised premises, and constructive when the lessor, without intending to oust the lessee, does an act by which the latter is deprived of the beneficial enjoyment of some part of the premises, in which case the tenant has his right of election, to quit, and avoid the lease and rent, or abide the wrong and seek his remedy in an action for the trespass. But in every case of constructive eviction the tenant must quit the premises if he would relieve himself from liability to pay rent; and whether or not he is justifiable in so quitting is a question of fact for the jury."

Both of said paragraphs of answer allege that the rented premises were used by appellee as a manufacturing establishment, that it occupied said premises with its employes, machinery, and material for the manufacture of women's garments by machinery and by hand, and that appellee at all times employed in its said factory from 50 to 200 persons.

Appellant's main contention is that neither the third nor the fourth paragraphs allege facts sufficient to show that at the time when appellee vacated the premises there was any failure on the part of appellant to furnish the necessary heat, and that appellee by continuing to remain in possession of the leased premises during the latter part of April and May waived its rights to claim an eviction. We cannot agree with this contention. The answers specifically allege facts sufficient to amount to a constructive eviction, and that appellee seasonably notified appellant of its intention to vacate the property, and that as soon thereafter as it was able to find a suitable location it vacated the property.

We hold that under the facts appellee vacated the property within a reasonable time after the alleged eviction. The heating of the building was a neglect of duty on the part of appellant. It was not necessarily and always the same, but depended upon the daily conduct of appellant and its servants. The extent of the inconvenience which would be suffered therefrom could not be anticipated with certainty, for the neglect from day to day in the future could not be known; hence it cannot be said that the appellee was bound immediately on the occurrence of the first failure or neglect to heat the building to make its election whether it would surrender the premises, but it was required to do so within a reasonable

time thereafter. The fact that it was warm weather at the time when appellee actually vacated the said premises will not avail appellant, inasmuch as such condition was not brought about by any act of appellant. There was no error in overruling the demurrer to either paragraph of answer.

Appellant insists that the finding of the court is not sustained by sufficient evidence, and that it is contrary to law on the theory that appellee did not vacate the premises until after the conditions which it claims justified its removal had ceased to exist. The evidence is voluminous and is ample to sustain the finding that the appellant failed to furnish sufficient heat, and that appellee vacated the premises within a reasonable time after such failure. Appellant made no effort during the winter months to remedy the defect, if any, in the heating apparatus, but insists that at the time when appellee vacated the premises there was no failure to furnish the necessary heat. The weather being warm at that time will not justify us in holding as a matter of law that there was no failure on the part of appellant to furnish the necessary heat. Whether the act of appellant in failing to furnish heat amounted to an eviction, and whether appellee vacated the premises within a reasonable time, were questions of fact to be determined by the court.

Complaint is also made that the court erred in admitting and excluding certain evidence. Without entering into a discussion of each separate exception, it is sufficient to say that in some instances the witnesses had already testified as to the facts sought to be proved. In other instances the objections were not specific or the recital of the evidence fails to show anything on the subject.

We have examined each question presented by appellant relative to the admission or rejection of evidence, and find no reversible error in

Judgment affirmed.

overruling the motion for a new trial.

NOTE—*Abandonment of Apartment for Prior Failure to Furnish Heat.*—Though the failure of a landlord to furnish to an apartment heat, as covenanted in a lease, may justify abandonment by the tenant, the really interesting question in the instant case is must the tenant do this during inclement weather? This we think depends upon the tenure that remains at the time and the conduct of the landlord subsequently.

Thus in New York jurisdiction, where occur many decisions in regard to evictions in such cases, it has been said that the deprivation of heat must be continued at the time of abandonment to work a constructive eviction. Ryan v. Jones, 20 N. Y. Supp. 842. And there must be prompt surrender after accrual of the right so to do. Siebold v. Hayman, 120 N. Y. Supp. 105.

In North Dakota it was ruled that the landlord must be notified and he must be given a reasonable time to furnish the heat. Russell v. Olson, 22 N. D. 410, 133 N. W. This case shows, however, that abandonment was very prompt and when inclement weather was just beginning, or the season therefor.

In N. W. Realty Co. v. Hardy, 160 Wis. 324, 151 N. W. 791, it is said arguendo (1) that temporary inconvenience does not justify abandonment by the tenant and (2) landlord after notice must be given opportunity to remedy defect. But the decision was not largely followed because the Court said: "It is pretty apparent from the testimony in this case that the tenant quit the leased room for business reasons, and not because of the heat situation."

In Buchanan v. Orange, 118 Va. 511, 88 S. E. 52, L. R. A. 1916E, 739, the lease was for five years and there was occupancy for a little more than three years, the cold season having just begun, but the notice that the tenant would vacate was given in the previous August. It recited also discomfort in prior years. The Court held that "the great weight of authority sustains the view that the facts of the instant case constitute a constructive eviction."

The Court thought that the common law rule did not apply in these cases, but that "the law would be stultifying itself to lay down, as a maxim in these cases, that there can be no abandonment unless it be shown that the landlord intended to dispossess the tenant. I am satisfied that under the more modern doctrine in cases of this character, the intention of the landlord should be held as a matter of law or of fact to be inferred from his acts."

In Pakas v. Rawle, 152 N. Y. Supp. 965, the tenant moved out because of insufficient heat, where landlord's promise to install a new radiator was not kept until the tenant had dismantled his apartment preparatory to moving. Abandonment was justifiable.

So while it has been ruled, as a general proposition, that removal or abandonment must be while discomfort is being suffered, yet, if landlord's promises have not been kept or he refuses to promise to remedy defects, all of the circumstances are to be taken into consideration. If there is reasonable necessity for the tenant, in view of business conditions, to prepare in advance for inclement weather, this is a question of fact in each case. The tenant cannot in disregard of his obligations under the lease abandon, but the landlord is not to be relied on implicitly to remedy defects where he has not complied or faithfully tried to comply in the past.

C.

ITEMS OF PROFESSIONAL INTEREST.

MAY THE COURTS BE GIVEN POWER TO DETERMINE CONSTITUTIONALITY OF ACT OF CONGRESS BY A DECLARATORY JUDGMENT?

Considerable interest was aroused by our editorial in the issue of November 12, 1920 (91 Cent. L. J., 351), upon the question: "Shall the Courts Become the Advisers of the People?" We were discussing the Declaratory Judgments Act approved by the American Bar Association at its last meeting and recommended to Congress for adoption. It has been suggested that the Act would run contrary to a decision of the Supreme Court in the case of Muskrat v. United States, 219 U. S. 346, which held that the Court could not determine the constitutionality of an Act of Congress unless the question arose in "a controversy arising between adverse litigants, duly instituted in courts of proper jurisdiction." It is contended that a declaratory judgment is not based on an "actual controversy" but is an attempt to secure the advice of the court before a controversy arises. Hon. Charles E. Hughes of New York in a supplementary statement to a recent report of the Committee having this matter in charge, answers this objection in the following manner:

"It is true that the Muskrat case dealt with the validity of an Act of Congress, but the ground of the decision was the fundamental one that the judicial power extended to 'cases and controversies,' that is, that the judicial power was 'the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' (219 U. S., p. 361.) It was not because the question was the determination of the validity of an Act of Congress, but because this question did not arise in an actual controversy, that the court found itself without power to determine it. Had there been an actual controversy, the question of the validity of an Act of Congress, or any other question properly brought before the court, could have been determined. But in the absence of an actual controversy, neither that question nor any other could properly be determined by the court. It was pointed out that the power to decide upon the constitutional validity of a statute existed only when the court was called upon to determine an actual controversy. It was said that the whole purpose of the law there in question was to determine the validity of the class of legislation, not in a suit arising between parties concerning a property right necessarily involved in the decision, but in a proceeding against the Government in its sovereign capacity. The United States was to be made a defendant but it had no interest adverse to the claimant's, the suit being brought solely to determine the validity of the legislation in question.

"I do not think, therefore, that it distinguishes the Muskrat case to say that it related to the determination of constitutional questions, for this fails to state the ground upon which the court found itself unable to determine the constitutional question. I think that the paragraphs relating to the Muskrat case should be changed, and particularly that portion which states the distinction between the Muskrat case and the proposed legislation. I do not think it should be said that probably legislation, conferring a power to determine the validity of an Act of Congress, would be within the rule in the Muskrat case. The question will be whether there is a 'case' or 'actual controversy,' and if there is not, it may be assumed that the statute would be held to be invalid whether or not it extended to the determination of constitutional questions. The point of distinction, it seems to me, should be, and it is sufficient to state, simply that the proposed legislation is intended to deal only with actual controversies and proposes that where there is an actual controversy between litigants, the court may render a declaratory judgment."

BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

Connecticut—New Haven, January 10, 1921.
Idaho—Boise, January, 1921.
Iowa—Waterloo, June 23 and 24, 1921.
Maine—Augusta, January 12, 1921.
Nevada—Reno, January, 1921.
New York—New York City, January 21 and 22, 1921.
Oklahoma—Oklahoma City, December 29 and 30, 1920.
Vermont—Montpelier, January 4, 1921.

CORRESPONDENCE.

SHOULD A JUDGE ACCEPT OTHER EMPLOYMENT.

Editor, Central Law Journal:

Nearly every story has a Moral, and hence every Moral has a Tale. The practical difficulty, sometimes, is to tell whether the Moral wags the Tale or whether the Tale wags the Moral.

However—

Once upon a time an artist located himself on Seventh street, N. W. or S. E., Washington, D. C. At the time John Marshall, Chief Justice of the United States, was a sitter for his portrait to the artist, who, himself, was not without prominence in his profession. One day a friend

from Boston called upon the artist, and expressed a strong desire to see the Chief Justice. The court was not in session at the time.

The artist told his friend that the Chief Justice could be seen passing the studio of the artist almost every morning. So the friend dropped in one morning to behold the great man, who certainly was a great man, if the republic ever had such on its list. "Pretty soon," as stories go, a slenderly built, gray-haired individual came along. He was in shirtsleeve array. He had in his mouth the remains of a straw. His gait was rather shuffling, his raiment not exceptionally sartorial and he was fanning himself with a rather dilapidated straw hat. The morning was warm, and doubtless the Chief Justice would have approved the suggestion of any Amicus curiae, that the use should be excused because of necessity. The moving picture was further embellished by a market basket on the C. J.'s arm.

"There," said the artist to his friend, "he is."

"My God!" said the friend, in apparent "holy horror," "is that the Chief Justice of the United States?'

"Certainly," said the artist. "And if you will, after a while, go farther up the street to a sort of playground that some elderly fellows have there, you will find the Chief Justice on his knees in the dirt, with his nose almost in the ground, trying to determine with a mint julep straw whether the horseshoe of the Secretary of the Treasury is nearer the peg than that of the Attorney General of the United States."

"Of all sad words of tongue or pen,
The saddest are these—it might have been."

So, as our dear teller of tales with morals, George Ade, would say, saith the poet, but the aforesaid was in error—the saddest of all such words are "it is."

Quoit pitching annals have not recorded whether the friend was himself a lover of the game or a member of some combination of horseshoe experts who might have need of an arbiter of some larger and more complicated dispute, and therefore tendered the learned Chief Justice a salary of $627,495 net, after deducting from an offer in gross, the salary already paid him by the people of the United States, which (for that day a rather liberal offer) was indignantly spurned by the justly incensed Chief Justice on the unquestionable ground that neither good morals, nor good conscience, nor an honest appreciation of judicial or legal propriety should tolerate in any judge the faintest inclination to accept such a flagrantly offensive offer.

The press dispatches announce that a certain federal judge will assume the "chairmanship of professional baseball clubs," becoming thereby the "final court of appeal" in all matters connected with the professional game of baseball throughout the United States.

There is no legal prohibition of the acceptance of such employment as the press advices indicate by any Judge of a Court of the United States. But of the acceptor, if one so accepts, he of himself, can only say, "I am now like he who treads alone some banquet hall deserted, whose hopes are fled, whose garlands dead and all but self departed."

CHESTER H. KRUM.

St. Louis, Mo.

HUMOR OF THE LAW.

Telegram from Bob (away on a survey job) to his wife in town: "Have forgotten drawing tools; please forward at once."

Note in reply from Mrs. Bob: "Dear Bob, do you want your triangles or a corkscrew?"—*Makin' Paper.*

"I hear tell that Gabe Gawkey is figgering on getting a divorce from his wife," said a neighbor. "What's the matter with her, anyhow?"

"She's plumb heartless!" replied Gap Johnson of Rumpus Ridge, Ark. "He talked about some spring medicine and she up and told him that the best kind to suit his case was a bucksaw and an ax. That there infernal lady hain't got no more feelings than a snapping turtle!"—*Kansas City Star.*

A crowd about a rigging attracted the attention of a sad-eyed individual who seemed to be still visibly affected by the succession of hang-overs that had marked his life before the long dry spell began.

"Whatsa matter?" he inquired.

"Oh, we're just watching the work."

"What work?"

"This is a drilling machine."

"What are they drilling for?"

"Water."

As the shaky individual turned to move away he muttered with fervor most intense:

"And to think we'd ever come to this."—*Youngstown Telegram.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Appeal and Error**—Evidence. — Partners may contract to share equally in the capital of the partnership although they may contribute thereto unequal amounts, and a finding, supported by evidence, that they did so contract, is conclusive on appeal to the Supreme Court.—Thrall v. Trout, Kans., 192 Pac. 750.

2. **Arrest**—Intentional Injury. — Neither an officer nor a private citizen who has arrested a third person for a misdemeanor has the right intentionally to injure or to kill the one arrested merely to prevent his escape.—People v. Lathrop, Cal., 192 Pac. 722.

3. **Assignments**—Notice.—A live stock commission merchant, after settlement with and payment to a customer for sale of stock on commission, is not liable to pay outstanding drafts drawn against the funds or proceeds arising from the sale, in the absence of notice of any outstanding obligation, such as a draft assigning the fund.—Schweers-Kern Live Stock Commission Co. v. Kothmann, Tex., 224 S. W. 593.

4. **Attachment**—Fraud.—The fact that defendant, an insolvent corporation, made no use of a small piece of land, and failed to pay taxes on it, after it had ceased to do business, for more than two years before action was brought, when all of its assets, except such piece of land, were sold under deed of trust, was no evidence of intent to defraud creditors on the part of defendant corporation justifying attachment against it.—First Nat. Bank of Tarboro v. Tarboro Cotton Factory et al., N. C., 104 S. E. 129.

5. **Bankruptcy**—Forfeiture. — Where a lease without rent, granted in consideration of delivery of corporate stock of the lessee, provided for forfeiture of the lease on bankruptcy of the lessee, the trustee in bankruptcy of an assignee of the lease cannot have enforcement of the forfeiture clause enjoined, where there was no showing of fraud or mistake.—Empress Theatre Co. v. Horton, U. S. C. C. A., 266 Fed. 657.

6.——Fraudulent Conveyance.—The giving by a corporation of a mortgage to secure payment of a note for supplies already furnished and those which were to be furnished for the purpose of enabling the corporation to continue its operations is not a fraudulent conveyance within Bankruptcy Act, § 67e.—In re Grocers' Baking Co., U. S. D. C., 266 Fed. 900.

7.——Jurisdiction.—Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference from the court of bankruptcy.—Griffin v. Lenhart, U. S. C. C. A., 266 Fed. 671.

8.——Voluntary Bankruptcy.—Whether the directors of a corporation, without authority from the stockholders, have power to file a petition in voluntary bankruptcy, must be determined by the law of the state in which the corporation is organized.—Fitts v. Custer Slide Mining & Development Co., U. S. C. C. A., 266 Fed. 864.

9. **Bills and Notes**—Negotiability. — A statement in a promissory note payable to order that it was given for the purchase of a stallion, which the payee warranted, does not destroy the negotiability of the note, under Negotiable Instruments Act.—Critcher v. Ballard, N. C., 104 S. E. 134.

10. **Brokers**—Commissions.—Brokers are entitled to their commission under a contract authorizing them to sell the land within one year, where they procured an offer and reported it to the owner who accepted it before the expiration of the year, though the formal contract of sale was not signed until after the year had expired.—Chandler v. Gaines-Ferguson Realty Co., Ark., 224 S. W. 484.

11.——Procuring Cause.—A real estate broker may be said to be the procuring cause of a trade, and entitled to a commission, though he communicates only with his principal, and not with the other party to the contract.—Barnes v. Beakley, Tex., 224 S. W. 530.

12.——Procuring Customer.—Where a broker contracts merely to procure a customer for the purchase of his employer's property, and not to effect a completed sale, his rights to commission, as against his employer, or as against a purchaser procured by him who agrees to pay the commission, are unaffected by the fact that the sale is never actually consummated.—Curran v. O'Donnell, Mass., 128 N. E. 408.

13.——Sale by Owner.—Where owner made contract with purchaser procured by broker on slightly different terms than those specified in contract with broker, but thereafter refused to consummate the transaction, broker was entitled to his commission.—Cooper v. Newson, Tex., 224 S. W. 568.

14. **Carriers of Goods**—Bill of Lading.—Issuance of bill of lading by a carrier adds nothing

to the binding force of the contract of carriage, and verbal agreement to accept and transport a car of designated freight, which is being loaded when the agreement is made, becomes a complete acceptance of the shipment for transportation when the loading is finished; the loaded car being on the railroad's track, where it was placed by the railroad to be loaded.—Hines, Director General of Railroads, v. Steele, Tex., 224 S. W. 606.

15. **Charities**—Defeat of Trust. — Testamentary trust created for the erection and maintenance of hospital for the poor in certain city was not defeated by the fact that at the time of the execution of the will there were no hospitals in such city and the existence of two such hospitals at time trust was sought to be enforced.—Jones' Unknown Heirs v. Dorchester, Tex., 224 S. W. 596.

16. **Commerce**—Food and Drugs Act. — The Food and Drugs Act has no application to a contract for sale and purchase of a food product to be performed in the state where made, because the purchaser may intend to use the product in interstate commerce.—Lewiston Milling Co. v. Cardiff, U. S. C. C. A., 266 Fed. 755.

17.——Taxation.—A state may in good faith tax property engaged in interstate commerce. It may not tax the commerce itself. The statute of this state imposing a gross earnings tax of 8 per cent upon express companies is a good-faith exercise of the taxing power.—State v. Wells Fargo & Co., Minn., 179 N. W. 221.

18. **Conspiracy** — Concert of Action. — An agreement to commit an offense which can only be committed by the concerted action of the two parties to the agreement does not amount to conspiracy, the crimes most frequently coming within the class being adultery, bigamy, incest, and dueling; but, if the agreement is between several persons, and is to cause the offense to be committed by others, or between a member of the combination and another, it may amount to conspiracy.—State v. Law, Ia., 179 N. W. 145.

19. **Contracts**—Severability.—A contract, illegal in part and legal as to the residue, is void as to all, when the two parts cannot be separated; when they can be, the good will stand and the rest fall.—Smith v. Rockett, Okla., 192 Pac. 691.

20.——Time of Performance.—Where a contract to make repairs on a house is silent as to time of performance, it is implied by law that the repairs are to be made within a reasonable time, and that which is so implied is as binding as that which is expressed.—Hayden v. Hoadley, Vt., 111 Atl. 343.

21. **Corporations**—Estoppel. — Defendant foreign corporation, which, although it had not completed its organization under the laws of Illinois, nevertheless allowed itself to be held out in California as a corporation, conducting business in the state as such, is estopped to deny the validity of its organization, to invalidate service of process on it through an agent. —Charles Ehrlich Co. v. J. Ellis Slater Co., Cal., 192 Pac. 526.

22.——Estoppel.—Consent by a corporate officer, who had a contract for employment by the corporation, to the appointment of a receiver, does not estop him from enforcing against the receiver his claim of breach of his contract.—Primos Chemical Co. v. Fulton Steel Corporation.—U. S. D. C., 266 Fed. 937.

23.——Promise by Organizer.—A corporation is not liable on a promise made by one of its organizers to pay for services rendered to the organizer in connection with property turned over to the corporation.—Speedograph Corporation v. Maier, N. J., 111 Atl. 325.

24.——Receivership.—Where a corporation, in its answer in a suit against it, by authority of its directors, whose good faith is not questioned, admitted its insolvency and consented to appointment of a receiver, stockholders are not entitled as of right to intervene for the purpose of overthrowing such action and securing a vacation of the receivership.—Cole v. Seaman, U. S. C. C. A., 266 Fed. 846.

25.——Slander.—A corporation is liable for slanderous words uttered by an authorized agent, who was at the time acting within the scope of his employment, where the language was used in the actual performance of the agent's duties.—Vowles v. Yakish, Iowa, 179 N. W. 117.

26.——Stockholders.—Equity does not hold innocent stockholders liable for profits made by some of the directors of a corporation through a sale by the corporation of stock pledged to it. —Western Securities Co. v. Silver King Consol. Mining Co. of Utah, Utah, 192 Pac. 664.

27.——Stockholder Liability.—In a South Dakota statute providing that each stockholder shall be individually and personally liable "for the debts of the corporation" to the extent of the amount unpaid on his stock, and be subject to suit therefor by a creditor of the corporation, the word "debts" does not include a liability of the corporation for a tort.—Clinton Mining & Mineral Co. v. Beacom, U. S. C. C. A., 266 Fed. 621.

28. **Criminal Law**—Confession.—In a prosecution for murder, evidence as to a confession by one of defendants, elicited by an officer after telling defendant that he "had better tell the truth," was erroneously stricken out.—People v. Foster, Mich., 179 N. W. 295.

29.——Former Conviction. — Where a former conviction is made the ground of some disability or penalty to be imposed upon a defendant found guilty of a second offense, the word "conviction," as used in the statute, generally connotes finality of judicial ascertainment, so far as the trial court is concerned.—State v. Savage, W. Va., 104 S. E. 153.

30.——Objection to Evidence.—In a murder trial, objections to the entire testimony of a witness are insufficient, where portions of such testimony are relevant.—Hall v. Commonwealth, Ky., 224 S. W. 492.

31. **Damages**—Special. — While, in general, damages for breach of a contract to pay a specific sum of money are measured by the sum stipulated to be paid, the rule is otherwise where the obligation to pay is special and has reference to objects other than the mere discharge of a debt, in which case special damages may be recovered according to the actual injury.—Dillon v. Lineker, U. S. C. C. A., 266 Fed. 688.

32. **Electricity.**—Licensee. — A manufacturing company and a power company, which maintained transformers on the other's premises with its consent, were not under duty to a boy on the premises, he being at most a licensee, to inclose or otherwise guard the transformers.—Robbins v. Minute Tapioca Co., Mass., 128 N. E. 417.

33. **Eminent Domain** — Consequential Damages.—Proceedings whereby a corporation condemned a tract of land which would be flooded by its dam do not prevent the owner of that tract from thereafter recovering consequential damages to another tract owned by him, but not connected with the tract condemned.—Connecticut Light & Power Co. v. McCarthy, Conn., 111 Atl. 365.

34.——United States.—The exemption of the United States from suit by an individual does not affect the rule that the United States cannot take private property from a citizen, except in accordance with the formal rules governing procedure in such cases.—Filbin Corporation v. United States, U. S. D. C., 266 Fed. 911.

35. **Equity**—Discretion.—Though equity generally follows the law as to the allowance of

interest, interest occasionally is allowed in the exercise of a sound discretion.—Goldman v. City of Worcester, Mass., 128, N. E. 410.

36. ——Divorce.—Equity may deny a divorce to one who did not enter the marriage relation in good faith, and who was actuated by ulterior and improper motives, since such party does not enter the court with clean hands.—Veeder v. Veeder, Iowa, 179 N. W. 136.

37. **Estoppel**—Duress. — If plaintiff assignor of his lease contract agreed to a particular distribution of the rents under the fear and compulsion of threats previously made against him by defendant assignee, and did so still acting under duress, he is not estopped thereby from claiming that defendant realized the benefits of an illegal transaction and was liable therefor.—Grice v. Herrick Hardware Co., Tex., 224 S. W. 533.

38.——Silence.—Mortgagor, who was present at a wrongful sale of his property under circumstances which called on him to speak, but made no protest, is estopped thereby to attack the validity of the sale in so far as the purchaser's title is concerned.—Burnett v. Dunn Commission & Supply Co., N. C., 104 S. E. 137.

39. **Frauds, Statute of**—Assignment of Lease. —The assignment of a lease is a contract concerning an interest in lands, which the statute requires to be in writing.—Inderlied v. Campbell, Me., 111 Atl. 333.

40. **Homicide**—Administration of Poison.—One causing another to inhale chloroform with intent to maliciously kill such person was guilty of "administering poison' to another within the meaning of Pen. Code, § 216,, relating to administering poison with intent to kill.—People v. Tinnen, Cal., 192 Pac. 557.

41. **Husband and Wife**—Separation.—A duly executed separation agreement, where the husband and wife are living apart or about to separate, is valid and enforceable, if fairly made.—Kerr v. Kerr, Mass., 128 N. E. 409.

42. **Injunction**—Attorney Fees.—In a suit on an injunction bond, conditioned that plaintiff will "pay all damages the defendant may sustain if the injunction is finally dissolved," the special item of attorney's fees are not recoverable.—United States Fidelity & Guaranty Co. v. Travelers' Ins. Mach. Co., Ky., 224 S. W. 496.

43.——Loss Without Injury.—Where retail shoe store owner signed agreement with Clerks' Union, but broke the contract, strike by the Clerks' Union was legally justified, and it, its members, and a central labor council had a legal right to notify union members the storekeeper was unfair to organized labor, that being done by pickets in a peaceful and lawful manner, and damage to the storekeeper was damnum absque injuria.—Greenfield v. Central Labor Council, Ore., 192 Pac. 783.

44.——Picketing.—Damages to jewelers from picketing, pursuant to strike called purely to enforce recognition of local union of jewelry workers, and concurred in by central labor council, in view of the facts and the motive of the strikers, held not damnum absque injuria, for which the employers would not have any right of action for injunction or otherwise.—G. Heitkemper v. Central Labor Council, Ore., 192 Pac. 765.

45. **Insurance**—Construction of Contract.—Court will construe exempting proviso drafted by insurer strictly against insured, and will resolve all doubt in favor of payment.—Kascoutas v. Federal Life Ins. Co., Iowa, 179 N. W. 133.

46.——Mutual Indemnity.—The right of insurance companies to enter into a contract mutually indemnifying each other for a portion of their losses on policies written within the state depends upon the law of the domicile of the companies, not upon the law of the state where the policies were written.—In re Continental Casualty Co., Iowa, 179 N. W. 185.

47. **Joint Adventures**—Cestuis Que Trust.—The fiduciary duties of the promoter of a syndicate attach when he first invites subscriptions to the syndicate, though at that time there are technically no cestuis que trustent.—Gates v. Megargel, U. S. C. C. A., 266 Fed. 811.

48. **Judgment**—Interlocutory Decree.—A decree is 'interlocutory," and not final, if the further action of the court in the cause, as distinguished from proceedings necessary to execute the decree, is necessary to give completely the relief contemplated by the court.—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, U. S. C. C. A., 266 Fed. 625.

49.——Nuisance.—If it can be cured and is not, every day's continuance of a nuisance is a repetition of the original wrong for which a new action will lie.—Thompson v. Illinois Cent. R. Co., Iowa, 179 N. W. 191.

50. **Libel and Slander**—Privilege.—A letter containing defamatory statements concerning defendant's salesman, written to other members of a trade association to which defendant belonged, is not a privileged communication.—Burghart v. Scioto Sign Co., Iowa, 179 N. W. 77.

51. **Marriage** — Annulment. — Plaintiff husband, who before marriage had been arrested for bastardy, and who consented to continuance until he had an opportunity to marry the girl, the officer keeping him in custody for that purpose, and chose to marry the girl instead of contesting the charge, the restraint not being to coerce him to marry her, was not entitled to have the marriage annulled as procured by duress and false imprisonment.—Day v. Day, Mass., 128 N. E. 411.

52. **Master and Servant**—Assumption of Risk. —An employe inexperienced in handling cylindrical shell castings piled in tiers about 6 feet high, so that the side of one pile supported the end of another, cannot be said as a matter of law to have known that compliance with his foreman's order for the removal of a shell some distance from the supported pile would cause its collapse.—Camire v. Laconia Car Co., N. H., 111 Atl. 340.

53.——Methods of Business.—A particular method of moving its trains, adopted by its employes without a railroad's knowledge or acquiescence, did not bind it, or render it liable for injuries to an employe claimed to have been caused by its failure to follow such method.—Howard v. New York, N. H. & H. R. R., Mass., 128 N. E. 422.

54.——Workmen's Compensation Act.—An employer of less than five workmen, who has not affirmatively elected to accept the provisions of the Workmen's Compensation Act, is not brought within its operation by reason of the fact that he is engaged in drilling an oil or gas well. An oil or gas well is not a mine within the meaning of the provision extending the effect of the act to mines irrespective of the number of workmen employed.—Hollingsworth v. Berry, Kan., 192 Pac. 763.

55. **Mechanics' Lien**—Filed Statement.—Where a husband or wife contracts for improvements on the property of the other, and a mechanic's lien is filed, it is not necessary that the lien statement shall recite that the contract was made with the husband or wife of the owner. —Hardman Lumber Co. v. Blanch, Kan., 192 Pac. 742.

56. **Mines and Minerals**—Necessary Development.—By virtue of the terms of the usual and ordinary oil and gas mining lease, the lessee is entitled to the possession of such portions of the surface of the land covered by the lease as may be reasonably necessary for the development and exploration of the leased premises under the terms of the lease.—Sanders v. Davis, Okla., 192 Pac. 694.

57. **Mortgages**—Foreclosure.—If there was no completed and valid foreclosure of a mortgage, there was no payment of the mortgage debt to the extent of the value of the land when entry was made by the mortgagee.—Fitchburg Co-operative Bank v. Normandin, Mass., 128 N. E. 415.

58. **Municipal Corporations**—Boundaries.—A municipality is competent to act beyond its boundaries only in cases in which it is so empowered by the Legislature, either expressly or by necessary and fair implication, which rule applies in determining whether or not bonds of an improvement district may be issued for expenditure of the proceeds outside of the district.—Mulville v. City of San Diego, Cal., 192 Pac. 702.

59.——Ordinance.—The mere fact that there is territory outside of a zone in a city in which a business subject to police power is permit-

ted, exactly similar to that inside the district, does not render the ordinance fixing the boundary between these two similar districts void because unreasonable.—Brown v. City of Los Angeles, Cal., 192 Pac. 716.

60. **Negligence**—Anticipation.—"Anticipation," in the meaning of the doctrine which holds property owners liable for injury to children by dangerous instrumentalities on their premises, where such injury should be anticipated, means probability, and not possibility, and there must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from that danger.—Hardy v. Missouri Pac. R. Co., U. S. C. C. A., 266 Fed. 860.

61. **New Trial**—Estoppel.—A party may not sit by while evidence, which on his own construction tends to establish waiver, is being put in, make no objection, and thereafter secure new trial on ground that verdict should not stand because, though the testimony was received without objection, it went beyond the paper issue; waiver not having been pleaded.—Fisher v. Skidmore Land Co., Iowa, 179 N. W. 152.

62. **Partition**—Cotenancy.—A cotenant of an estate in possession, though less than in fee, is entitled to maintain a suit for partition.—Teasley v. Hulme, Ga., 104 S. E. 151.

63. **Quieting Title**—Equity.—Equity has no jurisdiction over a bill to remove a cloud on title, where neither party was in actual possession of the land, and each claimed constructive possession by virtue of his paper legal title, since the question to be determined is the ownership of the legal title, which is a purely legal question, and must be tried at law.—Nugent v. Lindsey, N. J., 111 Atl. 324.

64. **Railroads**—Contributory Negligence.—An engine foreman, having full enjoyment of his faculties of seeing and hearing, in walking in railroad yards, where there were many tracks over which trains and cars were frequently passing, stepped in front of an aproaching train that could have been seen by him without difficulty if he had looked, is held to have been guilty of such contributory negligence as bars recovery, although the railway company was itself negligent in the running of the train.—Gaffney v. Atchison, T. & S. F. Ry. Co., Kan., 192 Pac. 736.

65. **Release**—Future Misconduct.—Though it is permissible to insure a person against liability to others for injuries caused by his future misconduct, it is not permissible to agree to release another from liability to the releasor for future misconduct.—Conn v. Manchester Amusement Co., N. H., 111 Atl. 339.

66.——Rescission.—A sum paid as consideration for a release of a claim for personal injuries cannot be retained by the party injured, who at the same time sought on the ground of fraud to rescind the release, because he recovered a greater amount; the principle that a party is not required to restore that which in any event he would be entitled to retain, having no application.—Garcia v. California Truck Co., Cal., 192 Pac. 708.

67. **Sales**—Implied Warranty.—When fertilizer is sold under guaranty of analysis stated on its tag, there is no implied warranty of its suitableness for the growing of a particular crop, though the seller knew that the buyer intended to use it to fertilize land for such crop.—Bowker Fertilizer Co. v. Wallingford, Me., 111 Atl. 329.

68——Lien.—Goods were sold, title vested in the buyer, notes were given for the price, and the seller retained possesion of the goods under a seller's lien. The buyer defaulted, and the seller elected to resell the goods. Held, the seller's remedy and the rule respecting damages are the same as if title had not passed and the seller had fixed his damages by resale.—Central Trust Co. v. Adams, Kan., 192 Pac. 761.

69. **Specific Performance** — Equity. — Though tenants failed to surrender possession at expiration of their term, a court of equity in the exercise of its discretion may deny specific performance of that covenant of the lease providing for surrender, where specific performance under the circumstances would be inequitable, or would work a hardship, etc.—Levell & Welsch Realty Co. v. Leggett, N. Y., 184 N. Y. Sup. 163.

70.——Rescission.—In a suit for the specific performance of a contract of defendant's intestate and others, the express purpose of which was to settle the rights of the parties in an intestate estate, evidence that the parties had not performed the agreement during four years thereafter, during which time defendant's intestate died, with a letter from plaintiff, acquiescing in delay of performance until further conversations between the parties which were not shown to have occurred, held to sustain the finding of rescission and abandonment of the contract necessary to sustain the trial justice's decree for defendant.—Snow v. Gould, Me., 111 Atl. 337.

71. **Torts**—Joint and Several Liability.—A tort gives rise to a several liability as to each one participating in it, and the plaintiff, if he so desires, may sue one or more of the joint tort-feasors without impleading all.—Lake Shore Stone Co. v. Westgate, Mich., 179 N. W. 264.

72. **Towns**—Ultra Vires.—One who has received benefit under a contract with a town cannot escape payment therefor on the ground that the contract was ultra vires for the town.—North Star Tp. v. Cowdry, Mich., 179 N. W. 259.

73. **Trusts**—Beneficiary.—Conveyances by a trustee in fraud of the rights of beneficiaries of the trust were good as against every one but the beneficiaries, and, as between the trustee and the grantees, title passed.—Cochrane v. McCoy, S. D., 179 N. W. 210.

74. **Vendor and Purchaser**—Mutual Mistake.—Equity will grant relief for a material deficiency in the quantity of land sold resulting from mutual mistake, as well as in cases of fraud.—Hohertz v. Durham, Tex., 224 S. W. 549.

75. **Waters and Water Courses**—Surface Water.—The fact that the dam constructed by defendants on their property and the ditch therefrom discharged more water and discharged it more rapidly on plaintiff's land, over which the surface water from defendant's land naturally flowed, does not impose liability on plaintiffs.—Isbell v. Lennox, Tex., 224 S. W. 524.

76. **Wills**—Confidential Relation.—When a confidential relation exists between the decedent and the person charged with undue influence, the ordinary rule that the burden is on contestant of the will is not changed.—In re Hodgman's Estate, N. Y., 184 N. Y. Sup. 185.

77.——Intention.—If ascertained testator's intention cannot operate wholly; it must be allowed to operate as far as possible.—In re Ullrich's Estate, Iowa, 179 N. W. 176.

78.——Next of Kin.—The words "next or nearest of kin," in a testamentary gift of the remainder to the person or persons living at the death of the life beneficiary, who shall then be "my next or nearest of kin on my father's side," with provision that, if there be more than one of such next of kin then living, the remainder shall be divided in equal shares, mean the class nearest in blood.—Barrett v. Egbertson, N. J., 111 Atl. 326.

79.——Signature of Testator.—A propounded instrument, consisting of a sheet of paper folded so as to make two leaves and four pages, having on the first page the printed form of a will, with blank space filled in with handwriting setting forth several legacies, "continued on next page," followed by a paragraph appointing executors and the testimonium clause, the signature of decedent and of two attesting witnesses, and an attestation clause, and again the signatures of the attesting witnesses, with their addresses, the second page of which contained certain dispositions, was not signed by testator and the witnesses at the end thereof, as required by statute, and hence would be denied probate.—In re Buckenthien's Will, N. Y., 184 N. Y. Sup. 189.

80. **Witnesses**—Cross-examination.—In an action by a woman for damages for personal injury, where her husband, as one of her witnesses, testifies concerning the extent of her disability after her injury, it is proper to cross-examine the husband concerning contradictory statements, made in a petition for a divorce filed by him against his wife.—Harmon v. Electric Theatre Co., Kan., 192 Pac. 732.